STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
(TALBOT PJ, and KELLY and HOOD JJ)

CHARLENE TATE,

Plaintiff-Appellant,

v

CITY OF DEARBORN,

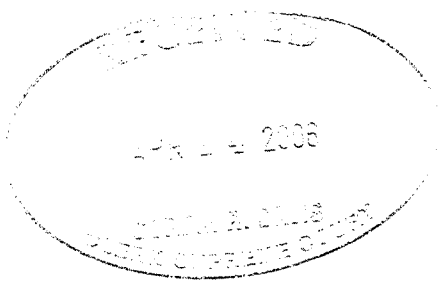
Defendant-Appellee.

Supreme Court No. 129241
Ct. of Appeals No. 261950
Wayne Circuit Court
Case No. 04-404500 NO
Hon. Daphne Means Curtis

DEFENDANT-APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

LAURIE M. SABON-ELLERBRAKE (P38329)
DEBRA A. WALLING (P37067)
Attorneys for Defendant-Appellee
13615 Michigan Ave.
Dearborn, MI 48126
(313) 943-2035



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COUNTER-STATEMENT OF FACTS

Within the Dearborn Police Department is a jail facility, established pursuant to the rules and regulations of the Michigan Department of Corrections. The jail houses 32 male prisoners and 16 female prisoners. During the week, two corrections officers ("COs") are responsible for monitoring movement within the cellblock. The two COs are supervised by two booking/desk officers (police officers) and one to two supervisors (sergeant and/or lieutenant). Weekends are different by comparison. Typically, one CO monitors the cellblock with assistance from a trustee. Again, the two are supervised by a booking/desk officer and one to two supervisors (sergeant and/or lieutenant).

On Sunday, February 18, 2001, Plaintiff-Appellant, Charlene Tate (hereinafter "Ms. Tate"), a 38-year-old female, was an inmate at the City of Dearborn jail facility. Ms. Tate was serving a 60-day sentence after pleading guilty to misdemeanor shoplifting.

On Sunday, February 18, 2001, Keith Fields, a part-time corrections officer employed by the City of Dearborn, had been assigned to work the day shift. [As a part-time employee, day shift meant working from 8:30 a.m. to 2:00 p.m.] Thirty-three individuals were in custody – three females and 30 males. Inasmuch as February 18, 2001 was a Sunday, no inmate movement was anticipated. CO Fields was assisted by one trustee and, if necessary, the Dearborn police officers working within feet of the jail.

The afternoon CO, Garland McWilliams, began his shift at approximately 1:45 p.m. Protocol requires the day shift and afternoon shift COs to exchange information

regarding prisoners and cell conditions. Fields advised McWilliams that "there were no problem prisoners" and that he had not processed any new prisoners during his shift. Fields then left the Police Department.

Protocol also requires the arriving CO to inspect the cellblock area at the beginning of his shift. When McWilliams entered the cellblock area, he heard screaming and banging from the female cellblock. As McWilliams approached the cell occupied by Charlene Tate, Ms. Tate yelled: "That black officer raped me and I want to talk to a supervisor."

McWilliams immediately reported the statement to the police supervisor in charge, Lieutenant Mary Ellen Archer. The cellblock was immediately locked down and a criminal investigation instituted. Ms. Tate was taken to the hospital for treatment; detectives were called in; search warrants were prepared and executed. On February 18, 2001, at approximately 8:00 p.m., Keith Fields was arrested and charged with two counts of criminal sexual conduct.

On May 15, 2001, Fields pled guilty to two counts of criminal sexual conduct second degree. Fields is currently serving 2 years 6 months to 15 years at Parr Highway Correctional Facility in Adrian, Michigan.

MS. TATE'S FIRST LAWSUIT

On July 11, 2001, Ms. Tate filed her first lawsuit against the City of Dearborn in the United States District Court (Case No. 01-72605). In that Complaint, Ms. Tate asserted a 42 USC §1983 claim and alleged that the City of Dearborn violated her constitutional rights by (1) failing to properly screen Fields prior to employing him; and

(2) failing to properly train/supervise Fields once he began working as a corrections officer. In addition to the federal claims, Ms. Tate asserted the following state claims: Count II: Gross Negligence, Intentional Willful and Wanton Misconduct of all Defendants and Count III: Assault and Battery. ***The federal court retained jurisdiction over the state claims.*** (See Complaint, Appellant's Appendix, Page 2A.)

On August 6, 2002, Dearborn's Motion for Summary Judgment was granted and Ms. Tate's case against Dearborn – state and federal claims -- was dismissed. (See Order Granting Defendant's Motion for Summary Judgment, Appellant's Appendix, Page 26A.) The dismissal of the federal case was not appealed.

MS. TATE'S SECOND LAWSUIT

On February 17, 2004 – more than 18 months after dismissal of the first (federal) lawsuit -- Ms. Tate filed her second (state) lawsuit against the City of Dearborn. In her second Complaint, Ms. Tate asserts a civil rights claim under the Elliott-Larsen Civil Rights Act, MCL 37.2101, *et seq.*, and alleges that Dearborn denied her "the full and equal use and enjoyment of the services, facilities or accommodations of the City's jail/institution." (See Wayne County Circuit Complaint, Appellant's Appendix, Page 27A).

On December 14, 2004, Dearborn filed its Motion for Summary Disposition, brought pursuant to MCR 2.116(C)(7), (8), and (10), asking the trial court to find that Ms. Tate's claim is barred due to a prior judgment or, in the alternative, that Ms. Tate's Complaint fails to state a claim upon which relief can be granted and that there is no genuine issue of material fact and Dearborn is entitled to judgment as a matter of law.

On March 4, 2005, at the close of oral arguments, the trial court denied Dearborn's motion. (See Order Denying Summary Disposition, Appellant's Appendix, Page 38A.) The trial court also denied Dearborn's oral motion to stay proceedings pending an appeal.

On April 8, 2005, Dearborn filed its Application for Leave to Appeal the decision of the trial court with the Michigan Court of Appeals. On May 17, 2005, the Court of Appeals issued an Order peremptorily reversing the trial court and holding that "principles of res judicata bar plaintiff's later state action." (See Court of Appeals Order, Appellant's Appendix, Page 42A.)

The decision of the Court of Appeals is based on established law. Therefore, Ms. Tate's request for leave or peremptory relief should be denied.

STANDARD OF REVIEW

This Court reviews de novo the question whether res judicata bars a subsequent action. *Adair v. State of Michigan,* 470 Mich 105, 119 (2004).

ARGUMENT

I. THE APPLICATION OF THE RULE IN *PIERSON SAND & GRAVEL, INC v KEELER BRASS CO.* TO THIS CASE WOULD ENCOURAGE GAMESMANSHIP.

The rule in *Pierson* is that "[p]laintiff's state claims which could have been brought with the federal claims by supplemental jurisdiction, clearly would have been barred by res judicata if the federal court had entered a judgment on the federal claim." 406 Mich. 372, 382; 596 N.W. 2d 153 (1999). This Court in *Pierson* also held that:

> [W]here the district court dismissed all plaintiff's federal claims in advance of trial, and there are no exceptional circumstances that would give the federal court grounds to retain supplemental jurisdiction over the state claim, then it is clear that the federal court would not have exercised its supplemental jurisdiction over the remaining state law claims. . . . we find res judicata does not bar plaintiff's instant action.

Id. at 374-375.

Pierson deals solely with cases wherein the federal district court dismissed all plaintiff's claims including state claims prior to trial. In this case, the plaintiff did allege two state claims with her §1983 federal claim. Plaintiff claimed gross negligence and willful and wanton misconduct. All of her claims, including the state claims, were addressed by the federal court judge in her opinion. (See Order Granting Defendant's Motion for Summary Judgment, Appellant's Appendix, Page 26A.) Clearly the rule in *Pierson* does not apply and to apply it would allow Plaintiff to play games with the judicial system.

II. THERE ARE DISTINGUISHING FACTORS BETWEEN THIS CASE AND *PIERSON,* SUPRA.

In *Pierson*, the question before the Court was "[w]hether plaintiffs' state claims, **which were not brought with the federal action**, are precluded by the doctrine of res judicata." *Id.* at 382. [Emphasis Added]

Contrary to Ms. Tate's assertions, *Pierson* does not mandate a different result in the case at bar. In *Pierson,* this Court clearly held that:

> Thus, plaintiff's state claims, which could have been brought with the federal claims by supplemental jurisdiction, clearly would have been barred by res judicata if the federal court had entered a judgment on the federal claim. However, if plaintiffs had brought the state claims in the federal court, and the federal court had refused to retain jurisdiction over them when it dismissed the federal counts, then the plaintiffs would not be barred by res judicata from bringing their state claims in state court.

Id.

In the case at bar, Ms. Tate did bring state claims – gross negligence and intentional misconduct – in federal court. The federal court did retain jurisdiction over the state claims and did enter a judgment on both the federal claims and the state claims. (See Order Granting Defendant's Motion for Summary Judgment, Appellant's Appendix, Page 26A.) The federal court did not refuse to retain jurisdiction over the state claims; as such, there is no reason to believe that the federal court would not have retained jurisdiction over the ELCRA claim, had Ms. Tate brought it in a timely fashion. Therefore, the decision of the Court of Appeals is correct – Ms. Tate's second lawsuit filed in state court is barred by the doctrine of res judicata.

Likewise, in *Bergeron v. Busch,* 228 Mich App 618 (1998), the Court of Appeals held:

> Consistent with *Gibbs* and the Restatement, most state and federal courts have held that when the federal claim in a federal action is dismissed before trial and it is clear that the federal court would have declined to exercise jurisdiction over a related state claim that could have been raised in the federal action through pendent jurisdiction, a subsequent action in state court on the state claim that would have been dismissed without prejudice in the prior federal action is not barred by the doctrine of res judicata.

Id. at 627, citations omitted.

In the case at bar, the federal court never declined to exercise jurisdiction over any of the state claims asserted by Ms. Tate. In fact, the federal court did exercise jurisdiction over Ms. Tate's state claims. Ms. Tate's subsequent lawsuit in state court is barred by the doctrine of res judicata.

III. A PLAINTIFF SHOULD PLEAD STATE LAW CLAIMS BASED UPON THE SAME FACTS AS AN ACTION THAT IT HAS BROUGHT IN FEDERAL COURT.

As a matter of compliance with Michigan law on claim preclusion, a plaintiff should be required to plead or attempt to plead a state law claim based upon the same facts as the action that it brought in federal court. Michigan law requires that a claim be precluded if the following are true: "(1) There was a prior and final decision on the merits, (2) the parties in both lawsuits are the same, (3) the matter in the second case was, or could have been, resolved in the first lawsuit." *Adair v State,* 470 Mich 105, 121, 680 N.W.2d 386 (2004).

Furthermore, claim preclusion bars "not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Sewell v. Clean Cut Mgmt.*, 463 Mich. 569, 575, 621 N.W.2d 222 (2001). In this case, Ms. Tate could have claimed a violation of the Elliott-Larsen Act along with her other state claims at the same time she brought her §1983 case.

In *Reid v. Thetford Township*, plaintiff was issued a citation by the township authorities. Reid failed to comply with the citation. The township authorities brought a case against him in 67th District Court of Genesee in order to enforce the citation. The county court entered a judgment against Reid ordering compliance. 377 F. Supp. 2d 621, 623 (2005)

A year later, Reid filed a lawsuit in Genesee County Circuit Court claiming a violation of his civil rights by the township and the citation officer. The township then removed the case from circuit court to the United States District Court. *Id.*

The District Court reasoned that:

> Reid's civil rights allegations could have been joined as counterclaims to the ordinance violation in the first action to form a convenient trial unit, which is the last of the factors used to apply the same transaction test. The civil rights claims have significant overlap in witnesses and evidence with the ordinance violation, despite different questions of law for the two matters. . . . The different focus of witness testimony or legal issues does not outweigh the common factual transaction that gave rise to both actions. Different legal issues in a second action do not necessarily mean the second action is a different claim, or arises from a different factual transaction, than the first action.

Id. at 628.

The Court determined that Reid was barred by claim preclusion from litigating his second case because the claims arose from the first case. The Court held "because Reid failed to raise the civil rights counterclaim in the first action, he is barred from raising them now. Even if he is considered to have raised those allegations, he is still barred from pursing them in this action because he failed to litigate them fully the first time." *Id.* at 630.

Plaintiff misleads this Honorable Court in her Brief on Appeal by claiming that her state claims were immediately dismissed without prejudice and that it would have been futile to amend her claim with additional state claims. (See Plaintiff's Brief on Appeal, Page 16-17.) In August of 2001, Judge Edmonds did dismiss all claims including state law claims without prejudice. However, Judge Edmonds required that Plaintiff file an amended complaint. Plaintiff did re-file with additional state claims. Specifically, Plaintiff alleged gross negligence and intentional misconduct. These claims were not dismissed by Judge Edmonds. She addressed them in her Order for Summary Judgment on August 6, 2002.

Giving Plaintiff another chance to litigate a claim that could have been brought before the federal court would encourage Plaintiff to continue to play games. Plaintiff even admits that she could have pled her ELCRA claim in her initial federal suit. "While it is true that Plaintiff could have included, but did not, her ELCRA claim in her 2002 §1983 federal suit, when she ultimately filed the state court ELCRA claim on February 17, 2004 . . .." (Plaintiff's Brief on Appeal, Page 16.) She had her chance to litigate her ELCRA claim in federal court along with her other state claims. Plaintiff, in an attempt to get a second chance at a claim against Defendant, chose not to include

all state claims and not appeal the decision of Judge Edmonds in 2002. Rather, Plaintiff waited until 2004 before raising another state claim that arose out of the same set of facts.

In keeping with Michigan law on claim preclusion and precedent set by current case law, a plaintiff should plead state law claims based upon the same facts as an action that is brought in federal court.

IV. THE INTERESTS OF FEDERALISM AND STATE SOVEREIGNTY ARE NOT IMPLICATED BY THIS CASE.

Both state and federal courts have jurisdiction over state and federal matters. For example, state courts hear and decide §1983 cases. At the same time, parties have the opportunity to move these cases from state court to federal court through the removal statute. If it were intended for each court to solely interpret its own laws, a plaintiff should not have the opportunity to allege the other court's claims at all. It then follows that all §1983 cases decided in state court should be set aside in the 'interest of federalism.'

Plaintiff argues in her Brief on Appeal that "as a matter of federalism, as well as of state sovereignty, and the preservation of the institutional autonomy of the state judicial system, our federal courts are properly reluctant to exercise supplemental jurisdiction to **construe ambiguous state law**." (Plaintiff's Brief on Appeal, Page 15.) [Emphasis Added]. In this case, there is no ambiguous state law alleged.

In this case, the interests of federalism and state sovereignty are not implicated. The federal court properly exercised supplemental jurisdiction to hear the two state

claims that Plaintiff alleged. To argue otherwise would be to destroy the most basic concepts of civil procedure.

CONCLUSION AND RELIEF REQUESTED

This Honorable Court should note that Plaintiff failed to answer the four questions ordered by this Court. Plaintiff's Brief on Appeal consists of two points and eighteen pages of filler. It is obvious that this Court is searching for clear, concise answers to the questions at hand. Defendant-Appellee has provided them.

For these reasons, Defendant-Appellee, City of Dearborn, respectfully requests that this Honorable Court uphold the decision of the Court of Appeals.

Respectfully submitted,

LAURIE SABON-ELLERBRAKE (P38329)

DEBRA A. WALLING (P37067)
Attorney for Dearborn
13615 Michigan Avenue
Dearborn, MI 48126
(313) 943-2035

Dated: April 13, 2006

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GEOFFREY N. FIEGER (P30441)
ROBERT M. GIROUX, JR. (P47966)
VICTOR S. VALENTI (P36347)
Attorneys for Plaintiff-Appellant
19390 W. Ten Mile Rd.
Southfield, MI 48075
(248) 355-5555

LAURIE M. ELLERBRAKE (P38329)
DEBRA A. WALLING (P37067)
Attorneys for Defendant-Appellee
13615 Michigan Ave.
Dearborn, MI 48126
(313) 943-2035
_____/

PROOF OF SERVICE

On April 13, 2006, I sent by first class mail a copy of ***Defendant-Appellee's Brief on Appeal, Oral Argument Requested*** and ***Proof of Service*** to:

Geoffrey N. Fieger, Esq.
Robert M. Giroux, Jr., Esq.
Victor S. Valenti, Esq.
19390 W. Ten Mile Rd.
Southfield, MI 48075

I declare that the above statement is true to the best of my information, knowledge and belief.

Cynthia Metz

Cynthia Metz